Supreme Court, U.S.
FILED

1

No. 05-644 NOV 17 2005

OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

HON. JAY W. FORBES, DISTRICT COURT JUDGE,

Respondent,

and

RALPH RODNEY EARNEST,

Real Party in Interest

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

PATRICIA A. MADRID
Attorney General of New Mexico

STEVEN S SUTTLE
Assistant Attorney General
Counsel of Record

ARTHUR W. PEPIN
Assistant Attorney General

MARTHA ANNE (WOOD) KELLY
Assistant Attorney General

111 Lomas Boulevard Northwest,
Suite 300
Albuquerque, New Mexico 87102
(505) 222-9000

Counsel for Petitioner

November 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Did the New Mexico Supreme Court violate the Supremacy Clause when, on collateral review, it retroactively applied this Court's decision in *Crawford v. Washington* to this 1983 conviction?

Does the New Mexico Supreme Court's decision to apply *Crawford v. Washington* retroactively on collateral review, despite the contrary holding of the United States Court of Appeals for the Tenth Circuit in *Brown v. Uphoff*, place New Mexico law in conflict with its circuit court on an important federal question?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS AND ORDER BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	17

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES:

Braxton v. United States, 500 U.S. 344 (1991) 15

Butler v. McKellar, 494 U.S. 407 (1990) 6, 13

Cooper v. Aaron, 358 U.S. 1 (1958) 13

Crawford v. Washington, 541 U.S. 36 (2004) ..... *passim*

Douglas v. Alabama, 380 U.S. 415 (1965) 3

Earnest v. New Mexico, 477 U.S. 648 (1986) (per curiam) (*Earnest II*) 1, 3, 7

Espinosa v. Florida, 505 U.S. 1079 (1992) (per curiam) 7, 8

Johnson v. California, ___ U.S. ___, 125 S.Ct. 2410 (2005) 14

Johnson v. New Jersey, 384 U.S. 719 (1966) 11

Lambrix v. Singletary, 520 U.S. 518 (1997) 7, 8, 13

Lee v. Illinois, 476 U.S. 530 (1986) 3, 7

Mackey v. United States, 401 U.S. 667 (1971) 16

Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by, Crawford v. Washington*, 541 U.S. 36 (2004) 4, 6, 7, 10

Schriro v. Summerlin, 542 U.S. 348 (2004) 5, 6, 13

Sims v. Georgia, 385 U.S. 538 (1967) 13, 14

Solem v. Stumes, 465 U.S. 638 (1984) 11

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Williams v. United States, 401 U.S. 646 (1971) 11

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES COURT OF APPEALS CASES:

Bintz v. Bertrand, 403 F.3d 859 (7th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 174 (2005) 6

Bockting v. Bayer, 399 F.3d 1010 (9th Cir.), *opinion amended*, 408 F.3d 1127, *rehr'g en banc denied*, 418 F.3d 1055 (2005) 9, 10

Brown v. Uphoff, 381 F.3d 1219 (10th Cir. 2004), *cert. denied sub nom., Brown v. Lampert*, ___ U.S. ___, 125 S. Ct. 940 (2005) 9, 14, 15

Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005) 9

Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004) (en banc), *cert. denied sub nom., Evans v. Roper*, ___ U.S. ___, 125 S. Ct. 902 (2005) 8

Ferguson v. Roper, 400 F.3d 635 (8th Cir. 2005) 9

Mungo v. Duncan, 393 F.3d 327 (2nd Cir. 2004), *cert. denied sub nom., Mungo v. Greene*, ___ U.S. ___, 125 S. Ct. 1936 (2005) 9

Murillo v. Frank, 402 F.3d 786 (7th Cir. 2005) 9

OTHER CASES:

Danforth v. State, 700 N.W.2d 530 (Minn. App.), *review granted* (Minn. Oct. 18, 2005) 9

In re Markel, 111 P.3d 249 (Wash. 2005) (en banc) 9

Jackson v. State, 925 P.2d 1195 (N.M. 1996) 11

Maso v. State, Taxation & Rev. Dept., 96 P.3d 286 (N.M. 2004) 11

People v. Edwards, 101 P.3d 1118 (Colo. App.), *cert. granted in part and pending* (Colo. Dec. 6, 2004) 9

TABLE OF AUTHORITIES – Continued

Page

State v. Alvarez-Lopez, 98 P.3d 699 (N.M.), *cert. denied*, ___ U.S. ___, 125 S.Ct. 1334 (2005) 3

State v. Boeglin, 731 P.2d 943 (N.M. 1987) 2

State v. Earnest, 703 P.2d 872 (N.M.) (*Earnest I*), *vacated and remanded*, *Earnest v. New Mexico*, 477 U.S. 648 (1986) (*Earnest II*) 1, 3

State v. Earnest, 744 P.2d 539 (N.M.) (*Earnest III*), *cert. denied*, *Earnest v. New Mexico*, 484 U.S. 924 (1987) 1, 3

State v. Forbes, 119 P.3d 144 (N.M. 2005) ..... *passim*

State v. Johnson, 98 P.3d 998 (N.M. 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 1334 (2005) 3

CONSTITUTIONAL PROVISIONS, RULES AND STATUTE:

28 U.S.C. § 1257 (1988) 2

N.M. CONST. art. II, § 1 13

N.M. CONST. art. II, § 14 11

Sup. Ct. R. 10.1 14

Sup. Ct. R. 13.1 2

U.S. CONST. art. VI 2, 13, 14

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of New Mexico, respectfully prays that a writ of certiorari issue to the New Mexico Supreme Court to review its decision entered in this matter on June 30, 2005.

OPINIONS AND ORDERS BELOW

State v. Earnest, 703 P.2d 872 (N.M.) (*Earnest I*), *vacated and remanded*, *Earnest v. New Mexico*, 477 U.S. 648 (1986) (per curiam) (*Earnest II*).

State v. Earnest, 744 P.2d 539 (N.M.) (*Earnest III*), *cert. denied*, *Earnest v. New Mexico*, 484 U.S. 924 (1987).

Decision in Matter of Petition for Writ of Habeas Corpus, Fifth Judicial District Court, Eddy County, State of New Mexico. App. 18.

Order Granting Petition for Writ of Habeas Corpus, Fifth Judicial District Court, Eddy County, State of New Mexico. App. 26.

Writ of Habeas Corpus, Fifth Judicial District Court, Eddy County, State of New Mexico. App. 29.

State v. Forbes, 119 P.3d 144 (N.M. 2005).[1] App. 1.

[1] The Petitioner's original action in the New Mexico Supreme Court was in the form of an emergency stay. The case was docketed as a petition for writ of superintending control and styled *State of New Mexico, Petitioner v. Hon. Jay W. Forbes, District Judge, Respondent, and Ralph Rodney Earnest, Real Party in Interest.*

Order (denying motion for rehearing), New Mexico Supreme Court. App. 31.

JURISDICTION

The New Mexico Supreme Court rendered its opinion on June 30, 2005. App. 1. The court denied Petitioner's timely motion for rehearing on August 26, 2005. App. 31. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988), and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Article VI, Supremacy Clause:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

STATEMENT OF THE CASE

On February 12, 1982, David Eastman was shot and stabbed to death in Eddy County, New Mexico. *State v. Boeglin*, 731 P.2d 943 (N.M. 1987). A jury convicted Ralph Rodney Earnest of first-degree murder and sundry offenses. He appealed. The New Mexico Supreme Court

reversed his conviction for what it deemed the improper admission of a statement by his confederate, Mr. Boeglin, to the police in violation of the Confrontation Clause. *Earnest I*, 703 P.2d at 875. The court relied on this Court's decision in *Douglas v. Alabama*, 380 U.S. 415 (1965). This Court granted certiorari review, vacated the judgment and remanded the case to the New Mexico Supreme Court for proceedings not inconsistent with the then-recent holding in *Lee v. Illinois*, 476 U.S. 530 (1986). *Earnest II*, 477 U.S. at 648. In *Lee*, this Court held a co-defendant's self-incriminatory statements against his penal interest containing sufficient indicia of reliability were admissible as substantive evidence against an accused and did not run afoul of the Confrontation Clause.

On remand, the New Mexico Supreme Court again considered the matter of Mr. Boeglin's out-of-court statement and following *Lee* affirmed Mr. Earnest's conviction. *Earnest III*, 744 P.2d at 540. This Court denied certiorari review. *Earnest v. New Mexico*, 484 U.S. 924 (1987).

Last year this Court handed down *Crawford v. Washington*, 541 U.S. 36 (2004), holding the Confrontation Clause prohibits the admission of unconfronted, testimonial, out-of-court statements as substantive evidence against an accused. The New Mexico Supreme Court adopted *Crawford* in *State v. Johnson*, 98 P.3d 998 (N.M. 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 1334 (2005); and *State v. Alvarez-Lopez*, 98 P.3d 699 (N.M.), *cert. denied*, ___ U.S. ___, 125 S.Ct. 1334 (2005).

On August 24, 2004, Mr. Earnest petitioned the New Mexico Supreme Court for a writ of habeas corpus seeking retroactive application of *Crawford* to his 1983 conviction. He asserted *Crawford* did not announce a new rule of law,

but was a "correction" of this Court's "erroneous" holding in *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by, Crawford v. Washington*, 541 U.S. 36 (2004). The New Mexico Supreme Court remanded the matter to the state district court for hearing. On February 15, 2005, the district judge granted the petition, issued a writ of habeas corpus and directed the New Mexico Department of Corrections to produce Mr. Earnest in court for release from custody. App. 26, 29. Petitioner requested an emergency stay in the state supreme court. The court granted the stay, ordered a response and held oral argument.

On June 30, 2005, the New Mexico Supreme Court retroactively applied *Crawford*, ratified the district court's decision that the error was not harmless, affirmed the order granting habeas corpus relief and directed that Mr. Earnest be retried or released. *Id.* at 146 n.2; 149, App. 5, 12. Petitioner moved for rehearing. The court denied the motion and simultaneously issued its mandate on August 26, 2005. App. 31.

REASONS FOR GRANTING THE PETITION

THE NEW MEXICO SUPREME COURT VIOLATED THE SUPREMACY CLAUSE WHEN, ON COLLATERAL REVIEW, IT RETROACTIVELY APPLIED THIS COURT'S DECISION IN *CRAWFORD V. WASHINGTON* TO THIS 1983 CONVICTION

In its opinion, the New Mexico Supreme Court concluded:

> It is beyond dispute that since *Crawford*, the rest of the nation knows now what the New Mexico

> Supreme Court announced in 1985: under the Sixth Amendment, statements from an alleged accomplice to an officer are inadmissible unless the declarant is unavailable and the defendant had the opportunity to cross-examine the declarant.

Forbes, 119 P.3d at 146, App. 6-7.

The court went on to write, "[I]t cannot be disputed that *Douglas*, which held that an accomplice statement was inadmissible unless the defendant had a right to cross-examine, was good law at the time we decided *Earnest I*. The New Mexico Supreme Court was correct to follow *Douglas*, which we believe the analysis in *Crawford* now confirms." *Id.* at 147, App. 8-9.

In so holding, the New Mexico Supreme Court departed from the well-settled doctrine of retroactive application of new rules of federal constitutional law to cases on collateral review as announced by this Court in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* presents a bright-line rule for such applications:

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).

In *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), this Court reiterated that the *Teague* analysis "gives retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." (quoting *Saffle v.*

Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 389 U.S. at 311)). *Accord Butler v. McKellar*, 494 U.S. 407, 412 (1990). New rules of procedure rarely apply retroactively as they do not produce a class of persons convicted of conduct the law cannot prohibit. New rules merely raise speculation that someone convicted with the use of the invalidated procedure might have otherwise been acquitted. *Summerlin*, 542 U.S. at 352. That *Crawford* represents a new rule is not open to serious question. As the United States Court of Appeals for the Seventh Circuit put it, "It seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*." *Bintz v. Bertrand*, 403 F.3d 859, 866 (7th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 174 (2005).

Teague also limits retroactive application to only two extremely narrow circumstances:

> First, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Second, a new rule should be applied retroactively if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.

489 U.S. at 307 (citations and internal quotation marks omitted).

Crawford represents a broad departure from the previous understanding of the Confrontation Clause and breaks new ground. The result announced in *Crawford* was not dictated by precedent at the time Mr. Earnest's conviction became final and meets neither prong of the *Teague* test. This Court's decision in Mr. Earnest's own

case evinces this. In *Earnest II*, this Court relied on *Lee* which unequivocally held that a co-defendant's self-incriminatory statements were admissible as substantive evidence against an accused and did not violate the Confrontation Clause when they bore sufficient indicia of reliability under the *Roberts* test. As the concurring opinion in *Earnest II* specifically noted, "As *Lee v. Illinois* makes clear, to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law." 477 U.S. at 649 (Rehnquist, J., concurring). Thus, the result Mr. Earnest sought below was not dictated by precedent at the time his conviction became final. In fact, the opposite is true.

The point is also well illustrated by *Lambrix v. Singletary*, 520 U.S. 518 (1997), where this Court extensively discussed what distinguishes a new rule from a rule that is merely an application of a settled principle. Specifically, the Court considered whether its opinion in *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam), striking down a portion of Florida's death penalty sentencing scheme, should be applied retroactively in a federal habeas corpus action brought by a condemned prisoner pursuant to *Teague*. The majority relied on a clear, common-sense test to determine the question of what constitutes a new rule of procedure. The Court first noted that the *Teague* test comprises three parts: 1) a determination of when the defendant's convictions became final; 2) "a survey of the legal landscape" at that time to determine whether a state court would have been compelled by existing precedent to conclude that the rule a petitioner seeks was required by

the Constitution; and 3) if the rule is truly new, an evaluation of whether it fits one of the two narrow exceptions found in *Teague*. *See Lambrix*, 520 U.S. at 527-28.

Ultimately, the Court held that the rule in *Espinosa* was not dictated by precedent and was a new rule unavailable as grounds for federal habeas corpus relief. *Lambrix*, 520 U.S. at 528-29. The Court clarified the *Teague* inquiry as follows:

> Most of [the] dissent is devoted to making a forceful case that *Espinosa* was a reasonable interpretation of prior law – perhaps even the most reasonable one. But the *Teague* inquiry – which is applied to Supreme Court decisions that are, one must hope, *usually* the most reasonable interpretation of prior law – requires more than that. It asks whether *Espinosa* was *dictated* by precedent – i.e., whether *no other* interpretation was reasonable. We think it plain from the above that a jurist considering all the relevant material . . . could reasonably have reached a conclusion contrary to our holding in that case. Indeed, both before and after Lambrix's conviction became final, every court decision we are aware of did so.

Lambrix, 520 U.S. at 538.

This Court did not specify that *Crawford* should be applied retroactively to cases on collateral review. Consequently, the federal courts have recently evaluated claims of retroactive application of *Crawford*. All but one court has rejected such claims.

The prevailing view in the United States circuit courts of appeal is well represented by *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004) (en banc), *cert. denied sub nom., Evans v. Roper*, ___ U.S. ___, 125 S. Ct. 902 (2005),

in which the court stated, "[T]he *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to *Teague v. Lane*'s non-retroactivity doctrine." To the same effect see *Brown v. Uphoff*, 381 F.3d 1219, 1226 (10th Cir. 2004) ("[]*Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law."), *cert. denied sub nom., Brown v. Lampert*, ___ U.S. ___, 125 S. Ct. 940 (2005); *Mungo v. Duncan*, 393 F.3d 327, 336 (2nd Cir. 2004) (concluding that *Crawford* is not a watershed rule under *Teague* and should not be applied retroactively on collateral review), *cert. denied sub nom., Mungo v. Greene*, ___ U.S. ___, 125 S. Ct. 1936 (2005); *Ferguson v. Roper*, 400 F.3d 635, 639 n.3 (8th Cir. 2005) (noting that it is doubtful that *Crawford* meets the *Teague* standard for retroactive application); *Murillo v. Frank*, 402 F.3d 786, 791 (7th Cir. 2005) ("[*Crawford*] is not an indispensable innocence-protecting decision that must be applied retroactively to criminal prosecutions that have already been finally resolved on direct review."); and *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005) ("*Teague* . . . prohibits [a petitioner] from availing himself of the new rule articulated in *Crawford*.").

Several state appellate courts have also refused to apply *Crawford* retroactively on collateral review. *See e.g. In re Markel*, 111 P.3d 249, 254 (Wash. 2005) (en banc); *People v. Edwards*, 101 P.3d 1118, 1124 (Colo. App.), *cert. granted in part and pending* (Colo. Dec. 6, 2004); *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App.), *review granted* (Minn. Oct. 18, 2005).

Only the United States Court of Appeals for the Ninth Circuit has held otherwise in a split decision in *Bockting v.*

Bayer, 399 F.3d 1010 (9th Cir.), *opinion amended*, 408 F.3d 1127, *rehr'g en banc denied*, 418 F.3d 1055 (2005). The reasoning employed to give *Crawford* retroactive effect has drawn strong dissent at every stop. Of particular interest is Judge O'Scannlain's dissenting opinion on behalf of nine judges to the order denying rehearing en banc:

> Almost any new rule will work to a criminal defendant's advantage in some circumstances. The question, though, is whether *Crawford's* new rule is of the magnitude of the one ruling that the Court has told us *would* apply retroactively – namely, the one articulated in *Gideon v. Wainwright*, that a defendant has the right to be represented by counsel.
>
> Yet *Crawford* hardly bears comparison with *Gideon*. . . . It is [] reasonable to say that, without counsel, the likelihood of an accurate conviction is *seriously* diminished.
>
> The *Crawford* rule simply does not approach this magnitude. It did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right. The difference between the pre-*Crawford* regime of *Ohio v. Roberts,* in which out-of-court statements not subject to cross-examination were admissible if they bore adequate indicia of reliability, and the new regime in which they are *per se* inadmissible, is small in comparison to the difference between giving a defendant competent counsel and giving him none at all.

Bockting, 418 F.3d at 1056 (O'Scannlain, J., dissenting) (citations and internal quotation marks omitted).

As this passage illustrates, this Court rarely grants retroactive application of a new rule of law to cases on collateral review, no matter how important or groundbreaking the new decision. *See, e.g., Johnson v. New Jersey*, 384 U.S. 719, 729-30 (1966) (refusing to retroactively apply *Miranda v. Arizona* and *Escobedo v. Illinois* to cases that were concluded when those decisions were announced); *Williams v. United States*, 401 U.S. 646, 650-51 (1971) (refusing to retroactively apply decision in *Chimel v. California* that narrowed the scope of searches incident to arrest); and *Solem v. Stumes*, 465 U.S. 638, 650 (1984) (refusing to retroactively apply decision in *Edwards v. Arizona* that required suspect to reinitiate interrogation after initial refusal to speak to officers).

Here, the New Mexico Supreme Court did not determine that the state constitution afforded a greater right to confront witnesses. *See* N.M. CONST. art. II, § 14. First, New Mexico courts do not ordinarily review unpreserved claims of state constitutional error. *Maso v. State, Taxation & Rev. Dept.*, 96 P.3d 286, 288-89 (N.M. 2004). Second, as the majority opinion noted, no textual difference exists between the confrontation clauses of the state and federal constitutions. *Forbes*, 119 P.3d at 145 n.1, App. 3. Despite the fact that Mr. Earnest raised this particular issue in previous appeals and habeas corpus actions, New Mexico law looks with disfavor on the retroactive application of any new rule to a conviction on collateral review. For example, in *Jackson v. State*, 925 P.2d 1195, 1197 (N.M. 1996), the court refused, on collateral review, to apply a new rule of double jeopardy jurisprudence which it based on its interpretation of this Court's decisions.

Here, the New Mexico Supreme Court concluded, "Our decision is limited to the very special facts of this case,

highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has been vindicated, which entitles him to the same new trial he should have received back then." *Forbes*, 119 P.3d at 148-49, App. 12. Whether the decision will for all time be limited to Mr. Earnest's case remains to be seen. Furthermore, limiting the decision to Mr. Earnest's case does not address the question presented here: can the state supreme court ignore *Teague's* dictates on the proper retroactive application of a new rule of federal constitutional law?

The position Petitioner takes here was aptly put in the dissent when Justice Patricio Serna wrote:

> This case involves an analysis of federal constitutional law, not, as in [*State v.*] *Ulibarri*, [994 P.2d 1164 (N.M. App. 1999), *aff'd*, 997 P.2d 818 (N.M. 2000),] state constitutional law. While it is within this Court's discretion to make our own rulings prospective or retroactive, it is within the discretion of the Supreme Court, and not the courts of New Mexico, to make the Court's interpretation of the Sixth Amendment in *Crawford* retroactive. I recognize that the majority limits its retroactive application of *Crawford* to the specific facts of this case and to this one habeas petitioner. Nevertheless, even for this one petitioner's claim of a violation of his federal constitutional rights, I believe we must defer to the Supreme Court's retroactivity analysis.

Forbes, 119 P.3d at 149, App. 14 (Serna, J., dissenting).

In departing from its previous decisions on retroactive application of a new rule on collateral review, the New Mexico Supreme Court relied on what it termed its "inherent power" in applying *Crawford* to Mr. Earnest's

conviction. *Forbes*, 119 P.3d at 147-48, App. 7. Whatever those inherent powers are and however they might be defined by that court, they cannot be employed to avoid New Mexico's duty to observe the supreme law of the land. U.S. CONST. art. VI. New Mexico is further bound to the decisions of this Court by the dictates of her own constitution. N.M. CONST. art. II, § 1 ("The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land."). *See Sims v. Georgia*, 385 U.S. 538, 544 (1967) ("[A] constitutional rule [is] binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed.").

This Court's decisions in *Teague*, *Lambrix*, *Butler*, and *Summerlin* are indisputably the supreme law of the land and the New Mexico courts are bound by those decisions. As this Court held in *Cooper v. Aaron*, 358 U.S. 1 (1958):

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . .

Id. at 18 (citation omitted).

The Supremacy Clause requires the New Mexico Supreme Court to defer to this Court's many prior decisions governing the retroactive application of new rules of procedure. A state supreme court cannot apply Sixth

Amendment jurisprudence contrary to this Court's prior decisions. U.S. CONST. art. VI; *Sims*, 385 U.S. at 544.

THE NEW MEXICO SUPREME COURT'S DECISION TO APPLY *CRAWFORD V. WASHINGTON* RETROACTIVELY ON COLLATERAL REVIEW, DESPITE THE CONTRARY HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN *BROWN V. UPHOFF*, PLACES NEW MEXICO LAW IN CONFLICT WITH ITS CIRCUIT COURT ON AN IMPORTANT FEDERAL QUESTION

The decision of the United States Court of Appeals for the Tenth Circuit in *Brown*, 381 F.3d at 1225-27, refusing to apply *Crawford* retroactively, places New Mexico law at odds with its own circuit court on this important question of federal constitutional law. Sup. Ct. R. 10.1(b); *Johnson v. California*, ___ U.S. ___, 125 S.Ct. 2410, 2413 (2005) (noting Supreme Court will resolve conflict between federal circuit court and state supreme court).

In *Brown*, the court held:

> Under *Teague*, new rules of constitutional law are not made retroactive to habeas petitions unless they place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or set forth watershed rules of criminal procedure. Accordingly, our first inquiry must be whether *Crawford* created a new rule of constitutional law.
>
> A decision by the Supreme Court announces a new rule if the result was not *dictated* by

> precedent existing at the time defendant's conviction became final. As we explained above, prior to the decision in *Crawford*, *Roberts* provided the appropriate framework for determining whether the admission of hearsay statements violated the Confrontation Clause. The Supreme Court itself noted that the logic of *Roberts* was inconsistent with the Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant. Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law.

381 F.3d at 1226 (citations and internal quotation marks omitted).

This then is the exact opposite of the position taken by the New Mexico Supreme Court: "Applying the *Teague* analysis to this case, we conclude that as to the unique facts and procedural posture of Earnest's case, *Crawford* does not announce a new rule because the result was dictated by precedent existing at the time we decided *Earnest I*." *Forbes*, 119 P.3d at 147, App. 8 (citation and internal quotation marks omitted).

This conflict between the New Mexico Supreme Court's opinion and the Tenth Circuit's reiteration of this Court's *Teague* jurisprudence provides an additional and independently sufficient reason for this Court to grant certiorari. *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

This case raises the same concern expressed by this Court in *Teague*: "In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of [state] criminal prosecutions . . . for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S. at 310. That is precisely what has happened here.

It has been said many times that the law favors finality. As Justice Harlan wrote in *Mackey v. United States*, 401 U.S. 667 (1971):

> The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Id. at 683 (Harlan, J., concurring in part and dissenting in part).

Justice Harlan also left us with this thought:

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Id. at 691.

Finality is all Petitioner seeks here.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment and opinion of the New Mexico Supreme Court.

Respectfully submitted,

PATRICIA A. MADRID
Attorney General of New Mexico

STEVEN S SUTTLE
Assistant Attorney General
Counsel of Record

ARTHUR W. PEPIN
Assistant Attorney General
MARTHA ANNE (WOOD) KELLY
Assistant Attorney General
111 Lomas Boulevard Northwest
Suite 300
Albuquerque, New Mexico 87102
(505) 222-9000

Counsel for Petitioner

November 2005

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Opinion Number: ___

Filing Date: ___

NO. 29,111

STATE OF NEW MEXICO,

Petitioner,

vs.

HON. JAY W. FORBES, District Judge,

Respondent,

and

RALPH RODNEY EARNEST,

Real Party in Interest.

ORIGINAL PROCEEDING

Patricia A. Madrid, Attorney General
Steven S Suttle, Assistant Attorney General
Albuquerque, NM

for Petitioner

Patricia A. Madrid, Attorney General
David K. Thomson, Assistant Attorney General
Santa Fe, NM

for Respondent

Gary C. Mitchell
Ruldoso, NM

J. Thomas Sullivan
Little Rock, AR

John Bigelow, Chief Public Defender
Sheila Lewis, Assistant Appellate Defender
Santa Fe, NM

for Real Party in Interest

OPINION

(Filed Jun. 30, 2005)

CHÁVEZ, Justice.

{1} On March 8, 2004, the United States Supreme Court issued *Crawford v. Washington*, 541 U.S. 36 (2004), holding that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. We applied this principle in *State v. Johnson*, 2004-NMSC-029, ¶¶ 2, 7, 136 N.M. 348, 98 P.3d 998. Respondent, Ralph Rodney Earnest (Earnest), who in 1985 [sic; 1983] was convicted of murder, conspiracy to commit murder, kidnaping, conspiracy to distribute a controlled substance, and possession of a controlled substance, filed a Petition for Writ of Habeas Corpus seeking a new trial based on the holding in *Crawford*. The facts and posture of Earnest's case present a unique reason for granting him a new trial on his convictions now over two decades old. In 1985 this Court, relying on

existing United States Supreme Court precedent, reversed his convictions for the very rationale stated by the United States Supreme Court in *Crawford*: that the admission of a prior statement by an alleged accomplice violated Defendant's rights under the Confrontation Clause[1] because it deprived Defendant of meaningful cross-examination. *State v. Earnest*, 103 N.M. 95, 99, 703 P.2d 872, 876 (1985) (*Earnest I*). However, our holding in *Earnest I* was vacated by the United States Supreme Court with instructions that we apply the reliability analysis in *Lee v. Illinois*, 476 U.S. 530 (1986), a case decided more than one year after we decided *Earnest I*. *New Mexico v. Earnest*, 477 U.S. 648 (1986) (*Earnest II*). We subsequently applied the reliability analysis and affirmed Earnest's convictions. *State v. Earnest*, 106 N.M. 411, 411, 744 P.2d 539, 539 (1987) (*Earnest III*).

{2} After a hearing on Earnest's habeas corpus petition, following *Crawford*, the district court concluded that *Crawford* did not announce a new rule of constitutional criminal procedure and that Earnest was entitled to its application. Accordingly, the district court granted Earnest's petition and issued a Writ of Habeas Corpus for the release of Earnest unless the State elected to retry him. The State filed a Verified Petition for Stay of Order Granting Petition for Writ of Habeas Corpus with this Court. We treated the Petition as one for superintending control, entered an order staying the district court action pending

---

[1] The Confrontation Clause in the New Mexico Constitution, Article II, Section 14, mirrors the Confrontation Clause of the United States Constitution, Amendment VI, for purposes of our analysis in this case.

further order of this Court, and set the matter for oral argument. We also recognize our jurisdiction under Rule 5-802 NMRA 2005. Because of the unique circumstances of Earnest's case, and our belief that the United States Supreme Court legal precedent at the time we decided *Earnest I* required the exclusion of the alleged accomplice statement, as *Crawford* suggests that it always has, we affirm the district court and remand for proceedings consistent with this opinion.

PROCEDURAL HISTORY

{3} The events leading to Earnest's convictions were alleged to have occurred on February 11 and 12, 1982. During Earnest's trial, information from two eyewitnesses, Conner and Boeglin, was provided to the jury. Conner took an oath and testified that while he and Boeglin committed the crimes, Earnest was not involved. The prosecution was given a full and fair opportunity to cross-examine Conner and challenge the reliability of his testimony. Boeglin, however, refused to take an oath and testify, despite having been granted use immunity, and was held in contempt of court. Over objection of defense counsel, the trial court declared Boeglin unavailable and admitted a tape recording and transcript of a statement Boeglin gave officers the day of his arrest. In his statement, Boeglin admitted that it was he who attempted to cut the victim's throat but he went on to implicate both Conner and Earnest, stating Earnest shot the victim in the head. *Earnest III*, 106 N.M. at 412, 794 P.2d at 540. Unlike the prosecution, which had a full and fair opportunity to cross-examine Conner, Earnest was deprived of the opportunity to cross-examine Boeglin to challenge the reliability of his statement. Boeglin's unsworn statement was admitted to

the jury as substantive evidence of Earnest's guilt. A jury found Earnest guilty of all charges.[2]

{4} On March 4, 1985, we reversed Earnest's convictions and remanded for a new trial, holding that Earnest's confrontation rights had been violated. *Earnest I,* 103 N.M. at 96, 703 P.2d at 873. We concluded that admission of this prior statement by the alleged accomplice "was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningful cross-examination," relying on *Douglas v. Alabama,* 380 U.S. 415 (1965) (holding that a confession of an alleged accomplice who implicated Douglas violated Douglas's right to confront and cross-examine the witness against him and was inadmissible because he did not have the opportunity to cross examine the alleged accomplice). *Earnest I,* 103 N.M. at 99, 703 P.2d at 876. We did not believe *Ohio v. Roberts,* 448 U.S. 56 (1980), which held that hearsay statements are admissible if the statements bear adequate "indicia of reliability," applied since the statement at issue in *Roberts* was a statement at a preliminary hearing where Roberts had the opportunity to cross-examine the declarant. *Earnest I,* 103 N.M. at 99, 703 P.2d at 876. The State appealed to the United States Supreme Court. On June 27, 1986, the United States Supreme Court entered a

---

[2] In its decision regarding the habeas corpus petition, the trial court concluded that admission of Boeglin's statement was not harmless beyond a reasonable doubt, citing *Earnest I,* in which we concluded that the statement was highly prejudicial. *See Earnest I,* 103 N.M. at 99, 703 P.2d at 876. We agree with the trial court's conclusion. *See Johnson,* 2004-NMSC-029, ¶ 33 (where custodial testimonial statement offers the only direct evidence, but is contradicted by other testimony, admission of the non-crossed statement is not harmless beyond a reasonable doubt).

per curiam decision which vacated *Earnest I* and remanded for "further proceedings not inconsistent with" *Lee v. Illinois*, 476 U.S. 530 (1986), an opinion decided more than one year after the New Mexico Supreme Court decided *Earnest I*. *Earnest II*, 477 U.S. at 648.

{5} On remand we interpreted the United States Supreme Court order as requiring us to give the State "an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns." *Earnest III*, 106 N.M. at 412, 744 P.2d at 540 (quoted authority omitted). We concluded that the accomplice statement at issue had sufficient indicia of reliability to satisfy the Confrontation Clause. *Id.* Thus, we held that the trial court had not erred in admitting the statement and affirmed Earnest's convictions. *Id.*

Earnest is Entitled to a New Trial

{6} From *Earnest II* up until *Johnson*, New Mexico courts continually applied the *Roberts* reliability test ("indicia of reliability") to accomplice statements, regardless of whether there had been an opportunity to cross-examine. *See, e.g., State v. Desnoyers*, 2002-NMSC-031, 132 N.M. 756, 55 P.3d 968; *State v. Martinez-Rodriguez*, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267; *State v. Torres*, 1998-NMSC-052, 126 N.M. 477, 971 P.2d 1267. It is beyond dispute that since *Crawford*, the rest of the nation knows now what the New Mexico Supreme Court announced in 1985: under the Sixth Amendment, statements from an alleged accomplice to an officer are inadmissible unless the declarant is unavailable and the defendant had

an opportunity to cross-examine the declarant. *See Crawford*, 541 U.S. at 68.

{7} Whether Earnest should now benefit from the holding in *Crawford* initially turns on whether *Crawford* announces a new constitutional procedural rule. *State v. Mascarenas*, 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221 ("An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a 'new rule.'"). In *Crawford*, the United States Supreme Court did not expressly state it was announcing a new rule. In *Johnson*, wherein we applied *Crawford*, we also did not state we were announcing a new rule. We analyze this issue by exercising our inherent power to decide whether rulings announce a new rule, and if so, whether the new rule is to be given prospective or retroactive application. *See State v. Ulibarri*, 1999-NMCA-142, ¶ 22, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818. In *Mascarenas*, we recognized the difficulty of determining when a case announces a new rule but looked to *Teague v. Lane*, 489 U.S. 288 (1989), for guidance:

> [W]e do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Mascarenas, 2000-NMSC-017, ¶ 24 (quoting *Teague*, 489 U.S. at 301).

{8} Applying the *Teague* analysis to this case, we conclude that as to the unique facts and procedural posture of Earnest's case, *Crawford* does not announce a new rule because the result was "dictated by precedent existing at the time" we decided *Earnest I*. *Teague*, 489 U.S. at 301. To aid our analysis, it is significant that Earnest preserved his argument that admission of the accomplice statement to police officers without him having the benefit of cross-examination violated his constitutional right to confront his accusers. Relying on *Douglas*, we agreed with Earnest in 1985 and reversed his conviction; the United States Supreme Court then reversed our opinion, asking us to reexamine the admissibility of the accomplice statement based on a case it decided over fourteen months after we decided *Earnest I*. The three Justices who separately concurred in *Earnest II* wrote that in their judgment, *Douglas* was no longer good law in view of *Lee*, stating "[a]s *Lee v. Illinois* makes clear, to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law." *Earnest II*, 477 U.S. at 649 (Rehnquist, J., concurring). The fact that the remaining six Justices did not join the concurrence by then-Justice Rehnquist suggests to us that *Douglas* remained good law. We believe *Crawford* reaffirmed this conclusion. *See Crawford*, 541 U.S. at 57 (citing *Douglas*, the Court stated "[w]e similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine."). In any event, it cannot be disputed that *Douglas*, which held that an accomplice statement was inadmissible unless the defendant had a right to cross-examine, was good law at the time we decided *Earnest I*.

{9} The New Mexico Supreme Court was correct to follow *Douglas,* which we believe the analysis in *Crawford* now confirms. To support its reasoning, the Court in *Crawford* detailed the history of a defendant's right to confront his accusers, underscoring the essential requirement in the common law of the opportunity to cross-examine one's accuser. *Crawford,* 541 U.S. at 42-50. The Court believed the historical review of the common law supported two fundamental principles underlying the Sixth Amendment's Confrontation Clause: 1) the prohibition of the use of *ex parte* statements as evidence against the accused; and 2) that the Framers of the Sixth Amendment would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable and the accused had a prior opportunity to cross examine the witness. *Id.* at 49, 53-54.

{10} The *Crawford* Court analyzed its previous decisions and concluded "[o]ur cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. Of paramount significance is the United States Supreme Court's observation that it had historically excluded accomplice confessions where the defendant had no opportunity to cross-examine, citing to *Douglas,* the very case we relied on when we initially reversed Earnest's convictions in 1985. *Id.* at 57. Furthermore, the Court did not find *Lee* contrary to its holding that testimonial statements are admitted only when the declarant is unavailable and the accused had an opportunity to cross-examine, thus drawing into question the conclusion of the concurring Justices in *Earnest II. See id.*

{11} *Crawford* did note, however, that while the results of its decisions had generally been faithful to the above-stated principle, the same could not be said for its rationales. *Id.* at 60. The Court found this was particularly true of the rationale used in *Ohio v. Roberts,* stating that *Roberts* conditioned "the admissibility of all hearsay evidence on whether [the evidence fell] under a 'firmly rooted hearsay exception' or [bore] 'particularized guarantees of trustworthiness.'" *Id.* at 60 (quoting *Roberts*, 44 U.S. at 66). *Crawford* disavowed this rationale, criticizing *Roberts* for failing to distinguish hearsay that was *ex parte* testimony, and for allowing the admission of *ex parte* testimony upon a mere finding of reliability:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. at 61.

{12} *Crawford* also discussed the various hazards associated with the *Roberts* reliability test. Not only is the

reliability test unpredictable, *Crawford* noted, but it allows the very statements the Confrontation Clause was intended to exclude, and courts find reliability in the very factors that make the statements testimonial. *Id.* at 63, 65. To highlight the latter hazard, the United States Supreme Court noted that one court held that the fact that the declarant's statement was made to police while in custody made the statement more clearly against penal interest and therefore reliable. *Id.* at 63 (citing *Nowlin v. Commonwealth,* 579 S.E.2d 367, 371-72 (Va. App. 2003)). The same may very well be said about our reliability approach in *Earnest III. See Earnest III,* 106 N.M. at 412, 744 P.2d at 540 (holding that the accomplice's statement was reliable because it was given without a promise of leniency, was against his penal interest, was not blame-shifting, and there was independent evidence corroborating his description of certain events). The reliability of testimonials must be assessed "in the crucible of cross-examination" to avoid these hazards and remain faithful to the history of the Confrontation Clause. *Crawford*, 477 U.S. at 61.

{13} In *Crawford,* therefore, the United States Supreme Court confirmed what the New Mexico Supreme Court announced in *Earnest I* – that a custodial statement by an alleged accomplice to a police officer is not admissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. Because Earnest did not have the opportunity to cross-examine Boeglin, the tape recording and transcript of his statement were inadmissible under our reading of United States Supreme Court precedent that existed at the time of *Earnest I,* which *Crawford* clarifies has always been a correct interpretation of the law. Granting Earnest a new trial is consistent with our responsibility "to do justice to

each litigant on the merits of his own case." *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting). Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then. Accordingly, we affirm the district court, lift the stay, and remand for execution of the Writ of Habeas Corpus, affording the State the opportunity to retry Earnest.

CONCLUSION

{14} Under the unique facts and procedural circumstances of this case, the district court is affirmed and this matter is remanded for execution of the Writ of Habeas Corpus, with the State having the right to decide whether to retry Earnest, in which case the district court shall consider conditions of release pending trial.

{15} **IT IS SO ORDERED.**

/s/ Edward L. Chàvez
EDWARD L. CHÀVEZ, Justice

WE CONCUR:

/s/ Richard C. Bosson
RICHARD C. BOSSON, Chief Justice

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

/s/ Petra J. Maes
PETRA JIMENEZ MAES, Justice

PATRICIO M. SERNA, Justice (dissenting)

SERNA, Justice (dissenting).

{16} I respectfully dissent. This case involves a petition for writ of habeas corpus and whether Earnest's incarceration violates his federal constitutional rights, specifically his right of confrontation under the Sixth and Fourteenth Amendments. The United States Supreme Court has explained that "it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.'" *Teague v. Lane,* 489 U.S. 288, 306 (1989) (quoting *Mackey v. United States,* 401 U.S. 667, 689 (1971) (Harlan, J., dissenting in part)) (alteration in original).

> "Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."

Id. (quoting *Mackey,* 401 U.S. at 682-83 (Harlan, J., dissenting in part)). The writ is not designed "simply to review the record for errors of the trial court; rather, habeas corpus inquiry is directed to the fairness of the entire proceeding, and a writ will lie when violations of the petitioner's constitutional rights rendered the judgment void by depriving the court of its jurisdiction." *Manlove v.*

Sullivan, 108 N.M. 471, 476 n.3, 775 P.2d 237, 242 n.3 (1989) (citation omitted).

{17} The majority, relying on *State v. Ulibarri*, 1999-NMCA-142, ¶ 22, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, appears to treat the question in this case as whether, in the exercise of this Court's "inherent power," we should give retroactive effect to *Crawford v. Washington*, 124 S. Ct. 1354 (2004). I respectfully disagree. This case involves an analysis of federal constitutional law, not, as in *Ulibarri*, state constitutional law. While it is within this Court's discretion to make our own rulings prospective or retroactive, it is within the discretion of the Supreme Court, and not the courts of New Mexico, to make the Court's interpretation of the Sixth Amendment in *Crawford* retroactive. I recognize that the majority limits its retroactive application of *Crawford* to the specific facts of this case and to this one habeas petitioner. Nevertheless, even for this one petitioner's claim of a violation of his federal constitutional rights, I believe we must defer to the Supreme Court's retroactivity analysis. This Court has not adopted the analysis in *Crawford* as a matter of independent state constitutional law. In resolving a federal constitutional claim, we are bound by *Crawford* as a matter of federal supremacy; the fact that we have done what is required of us and applied *Crawford* in our own cases does not transform the matter into an issue of state law or invest this Court with discretion over *Crawford's* retroactivity.

{18} The Supreme Court has stated that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. "Application of

constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309.

> New rules of procedure . . . generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004) (quoted authority omitted).

[19] Under this analysis, federal and state courts have overwhelmingly concluded that *Crawford* is not retroactive because, under *Teague,* it creates a new rule of law and does not fall within the limited exceptions to prospectivity. *Murillo v. Frank,* 402 F.3d 786, 790 (7th Cir. 2005); *Dorchy v. Jones,* 398 F.3d 783, 788 (6th Cir. 2005); *Brown v. Uphoff,* 381 F.3d 1219, 1227 (10th Cir. 2004), *cert. denied sub nom. Brown v. Lampert,* ___ U.S. ___, 125 S. Ct. 940 (2005); *Mungo v. Duncan,* 393 F.3d 327, 336 (2d Cir. 2004), *cert. denied sub nom. Mungo v. Greene,* 125 S. Ct. 1936 (2005); *Evans v. Luebbers,* 371 F.3d 438, 444 (8th Cir. 2004) (en banc) ("[T]he *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to *Teague v. Lane's* nonretroactivity doctrine."), *cert. denied sub nom. Evans v.*

Roper, 125 S. Ct. 902 (2005); *People v. Edwards,* 101 P.3d 1118, 1123 (Colo. Ct. App.), *cert. granted,* No. 04SC565, 2004 WL 2784662 (Colo. 2004); *State v. Tarver,* 2005-Ohio-3119, 2004 WL 1463240, at *3 (Ohio Ct. App. June 20, 2005); *In re Markel,* 111 P.3d 249, 254 (Wash. 2005) (en banc).

> It is obvious to us . . . that *Crawford* establishes a new rule. It discards the framework that *Roberts* had adopted. True enough, . . . *Crawford* did not say that it was overruling *Roberts*; it emphasized that the declarant in *Roberts* had been subject to cross-examination. But it assuredly (and explicitly) jettisoned the *Roberts* standard. All of the Supreme Court's decisions between *Roberts* and *Crawford* had applied that understanding, though some of the Justices had questioned whether it should be maintained. . . . A rule is "new" for retroactivity analysis unless it was dictated by earlier decisions. *Crawford* was not "dictated" by *Roberts* or *Lilly*; it broke from them. That the break takes the form of a return to an older, less flexible but historically better grounded approach does not make it less a break. All constitutional decisions find their ultimate basis in texts adopted long ago – here in the Bill of Rights (1791) and their application to the states via the fourteenth amendment (1868). Judicial rhetoric routinely invokes older norms. This does not mean that there has been no "new rule" of constitutional criminal procedure since 1868.

Murillo, 402 F.3d at 790 (citations omitted).

{20} For purposes of Earnest's habeas petition, we apply the law prevailing at the time his conviction became final. Despite the majority's inclination to apply our analysis

from *Earnest I,* Earnest's conviction was not final at that time; his case was still on direct review when we decided *Earnest III.* As a result, it is the law applied in *Earnest III* that is relevant. Because this Court was under a Supreme Court mandate to apply the analysis from *Lee v. Illinois,* 476 U.S. 530 (1986), rather than *Douglas v. Alabama,* 380 U.S. 415 (1965), I believe that our application of the law existing at the time could not be said to be unreasonable or in violation of Earnest's federal constitutional rights. Based on my conclusion that *Crawford* creates a new rule, which does not apply to Earnest's collateral attack on his conviction, his current incarceration also does not violate the federal Constitution. As a result, despite *Crawford's* change in the law, Earnest's incarceration is not illegal or unconstitutional within the meaning of Rule 5-802 NMRA 2005, and I believe there are no grounds for issuing the writ of habeas corpus.

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

FIFTH JUDICIAL DISTRICT
COURT
STATE OF NEW MEXICO
COUNTY OF EDDY
STATE OF NEW MEXICO,

Plaintiff,

No. CR-82-54-JWF

VS.

RALPH RODNEY EARNEST,

Defendant.

DECISION IN MATTER OF PETITION FOR WRIT OF HABEAS CORPUS

(Filed Jan. 11, 2005)

This matter came before the Court 14 December 2004 for argument on the Petition of Ralph Rodney Earnest for Writ of Habeas Corpus. The Petitioner, Ralph Rodney Earnest, was represented by Trial Attorney, Gary C. Mitchell, and Appellate Counsel, J. Thomas Sullivan. The State of New Mexico was represented by Fifth Judicial District Attorney, Thomas A. Rutledge. The matter was briefed by both counsel. It basically involves the question as to whether or not the Supreme Court Decision *Crawford v. Washington*, 124 S.Ct. 1354 is retroactive. Counsel argued their respective positions and the Court has reviewed their written Briefs and now enters this Decision.

FINDINGS OF FACT

1. Petitioner, Ralph Rodney Earnest, is imprisoned or otherwise restrained at the Arizona State Department of Corrections, Lewis Complex, Stiner-Red Unit, located at Buckeye, Arizona, on an Order transferring Petitioner

from confinement in the Penitentiary of New Mexico to the Arizona Department of Corrections.

2. Petitioner challenges his convictions for the offenses of felony murder, conspiracy to commit murder, kidnapping, and conspiracy to commit distribution of a controlled substance. Petitioner moves to vacate the Judgment entered in Cause No. CR-82-54, entered by the District Court of Eddy County, New Mexico, filed on September 19, 1983, based on his argument that his right to confrontation guaranteed by the Sixth Amendment to the United States Constitution was violated by admission of a non-testifying accomplice(s) statement against him at Trial.

3. Petitioner's first Trial on the charges in CR-82-54 was terminated by mistrial ordered by the Trial Court, when co-defendant, Phillip Boeglin, refused to testify as a witness for the State after being granted use immunity for his testimony. See *State v. Earnest*, 103 NM 95, 98, 703 P.2nd 872, 874-75 (1985) (hereinafter, *Earnest I*).

4. At Petitioner's second Trial, the statement of Philip Boeglin, an indicted co-conspirator and accomplice to the offenses for which Petitioner was charged and convicted, was admitted in evidence against Earnest over his objection. Boeglin did not testify at this Trial despite being ordered to do so under a grant of immunity and finding of contempt when he persisted in asserting his privilege to remain silent in violation of the Trial Court's Order. Petitioner was convicted on all counts and appealed his convictions to the New Mexico Supreme Court.

5. On direct appeal, the New Mexico Supreme Court reversed Petitioner's conviction based on a violation of his Sixth Amendment right to confront witnesses and noted

his reliance on the United States Supreme Court's Decision in *Douglas v. Alabama*, 380 US 415 (1965). *Earnest I*, 103 NM at 98, 703 P2d at 875. The Supreme Court held that admission of Boeglin's statement was prejudicial and violated Petitioner's right to confrontation because he was not able to cross-examine the declarant once Boeglin refused to testify. *Earnest I*, 103 NM at 99, 703 P.2d at 876.

6. The State petitioned the United States Supreme Court for a Writ of Certiorari, which was granted. The Supreme Court vacated the Judgment of the New Mexico Supreme Court and remanded the cause for reconsideration in light of its recent Decision in *Lee v. Illinois*, 476 US 530 (1986). *New Mexico vs. Earnest*, 477 US 648 (1986).

7. On remand, the New Mexico Supreme Court concluded the Boeglin statement did bear sufficient "indicia of reliability" to satisfy Confrontation Clause concerns. The Court reversed its prior opinion and affirmed Petitioner's conviction. *State v. Earnest*, 106 NM 411, 411-12, 744 P.2nd 539, 539-40 (1987) (hereinafter *Earnest II*). Thereafter, the United States Supreme Court denied Earnest's Petition for Certiorari. *Earnest v. New Mexico*, 848 US 924 (1987).

8. Petitioner then sought relief by petitioning this Court for a Writ of Habeas Corpus, arguing that admission of the Boeglin statement without opportunity for meaningful cross-examination and/or any cross-examination whatsoever at any stage of the proceedings denied and violated his right to confrontation under the State Constitution. New Mexico Constitution, Article II, Section 14.

9. Petitioner's State constitutional argument was raised in his initial Brief on direct appeal to the New

Mexico Supreme Court, and Briefed and argued as an independent point of error in his Brief to the Court following the remand by the United States Supreme Court in *New Mexico v. Earnest*, supra. Although the Court noted the excellent Briefs and oral arguments of both parties on remand, it did not address the State constitutional claim in its opinion affirming Earnest's conviction. *Earnest II*, at 412, 540. Petitioner's State constitutional claim was rejected by this Court and the State Supreme Court denied his Petition for Writ of Certiorari.

10. Petitioner then challenged his conviction based on admission of the Boeglin statement and other grounds in a petition for federal habeas corpus, pursuant to 28 USC 2254. The United States District Court denied relief and the Court of Appeals affirmed. *Earnest v. Dorsey*, 87 F.2d [sic; F.3d] 1123, 1130-33 (10th Cir. 1996). The United States Supreme Court again denied Earnest's petition for review by certiorari. *Earnest vs. Dorsey*, 519 US 1016 (1996).

11. Petitioner has invoked the jurisdiction of this Court, pursuant to Rule 5-802, NMRA, of the Rules of Criminal Procedure for the District Courts. Petitioner urges the following claims for relief from the Judgment and Sentence imposed by this Court in this cause:

I.

Petitioner is entitled to relief from his conviction based on the admission of the custodial statement of an accomplice who did not testify at Trial and was never subject to cross-examination because it rests on a Rule of Federal Constitutional Criminal Procedure now rejected by the United States Supreme Court.

II.

The conviction should be set aside because it was obtained in violation of the right to cross-examination protected by the New Mexico Constitution as a component of its confrontation guarantee.

III.

Petitioner is entitled to retroactive application of the holding of the United States Supreme Court in *Crawford v. Washington*, 124 S.Ct 1354, 1368 (2004) requiring cross-examination as a necessary component of the confrontation guarantee of the Federal and State Constitutions based on New Mexico Retroactivity Doctrine. Petitioner is entitled to relief from his conviction based on the admission of a custodial statement made by his accomplice who did not testify at Trial and was never subject to cross-examination because it rests on a Rule of Federal Constitutional Criminal Procedure that has been rejected by the United States Supreme Court.

12. Petitioner was convicted at Trial based on evidence, which included the statement made to investigating officer by his alleged accomplice and co-defendant, Boeglin. Boeglin's statement was made to officers shortly after his arrest and not in the course of any judicial proceeding. Boeglin refused to testify after being called by the State despite having been granted use immunity and found to be in direct contempt for refusing to testify pursuant to the grant of immunity. Following his refusal to testify, the Court declared him unavailable as a witness and permitted the State to play Boeglin's tape recorded statement before the jury and also allowed jurors to use

individual transcripts of the tape recorded statement to aid in understanding the contents of the recording. Defendant objected to admission of the statement based on Petitioner's right to confront the witness and engage in meaningful cross-examination. *Earnest I*, at 97-98, 874-875.

13. Boeglin's statement admitted at Trial was not made in the course of a judicial proceeding. Petitioner had no opportunity to cross-examine Boeglin regarding its contents. The statement was highly prejudicial. *Earnest I*, at 98, 875.

CONCLUSIONS OF LAW

1. This Court is bound by facts previously found by the New Mexico Supreme Court on the direct appeal from Petitioner' conviction.

2. Admission of Boeglin's statement implicating Petitioner in the commission of the offenses charged was based on the reliability of Boeglin's statement to police as a declaration against his penal interest. *State v. Earnest*, 106 NM 411, 411-12, 744 P.2d 539, 539-40 (1987) (*Earnest II*).

3. Petitioner preserved error of his confrontation claims by timely objecting to the admission of Boeglin's statement as depriving him of an opportunity to cross-examine the witness and declarant, Boeglin. *Earnest I*, at 98, 875.

4. Boeglin's statement was "testimonial" since it was elicited by or made to police during the course of interrogation. *Earnest I*, at 94-95, 874. ["Defendant and his two co-defendants were arrested on the morning of February

12, 1982. On that same day, co-defendant Boeglin and Connor both gave statements to police officers. Each of these statements were tape recorded and subsequently transcribed. Boeglin's statement describes the events leading up to and including the murder. It incriminates Defendant [sic], Boeglin and Connor."]

5. In *Crawford v. Washington*, 124 S.Ct. 1354, 1368 (2004), the United States Supreme Court held that admission of a non-testifying accomplice's statement to police without any opportunity for cross-examination by the defense violates the confrontation guarantee of the Sixth Amendment to the United States Constitution. Boeglin's statement constitutes a testimonial statement as defined by the Supreme Court in *Crawford*, 124 S.Ct. at 1374.

6. The Supreme Court did not announce a "new rule" of constitutional criminal procedure in *Crawford v. Washington*, supra. Rather, the rule applied in *Crawford* was dictated by the Court's prior decisions. Thus, Petitioner is entitled to retroactive application of the holding in *Crawford*, having properly preserved his claim of error at Trial and pursued it through his direct appeal.

7. The admission of Boeglin's statement against Petition at Trial violated Petitioner's right to confrontation under the Sixth Amendment. The New Mexico appellate Courts have adopted *Crawford*. *State v. Johnson*, 2004-NMSC-029, ¶7, 98 P.3d 998, 1002; *State v. Alvarez-Lopez*, 2004-NMSC-030, 98 P.3d 699; *State v. Duarte*, 2004-NMCA-117, 98 P.3d 1054.

8. The admission of Boeglin's statement was not harmless beyond a reasonable doubt. The New Mexico Supreme Court has held that a confrontation violation resulting from lack of cross-examination of the declarant of

a testimonial statement requires an analysis of harm. *State v. Johnson*, 2004-NMSC-029, 98 P.3d at 1003. This Court is bound by the prior determination of the Supreme Court that admission of Boeglin's statement was prejudicial and required reversal in its initial determination on Petitioner's direct appeal. *Earnest I*, 703 P.2d at 876 ("We therefore determine that admission of Boeglin's statement was highly prejudicial, violated Defendant's confrontation rights, and deprived Defendant of meaningful cross-examination.")

9. Therefore, this Court finds that the admission of Boeglin's statement against Petitioner at Trial without opportunity for meaningful cross-examination constituted a violation of Petitioner's right to confrontation under the Sixth Amendment to the United States Constitution and Article II, Section 14, of the New Mexico Constitution and constituted error in the conduct of Petitioner's Trial that resulted in his conviction.

10. The Writ of Habeas Corpus should be granted. The State of New Mexico is allowed 15 days to file their Requested Findings of Fact and Conclusions of Law and in 30 days be permitted to Appeal this Court's Decision.

11. Mr. Mitchell is directed to prepare an Order granting the Writ allowing the Appeal and submit same to the Court for entry into the record.

/s/ Jay W. Forbes
JAY W. FORBES
DISTRICT JUDGE

XC: ✓Gary C. Mitchell, Esq.
✓J. Thomas Sullivan, Esq.
✓Thomas A. Rutledge, Esq.

STATE OF NEW MEXICO
COUNTY OF EDDY
FIFTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs.

RALPH RODNEY EARNEST,

Defendant.

Cause No. CR-82-54JWF
Division____

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

(Filed Feb. 15, 2005)

THIS MATTER came before the court December 14, 2004 for argument on the Petition of Ralph R. Earnest for a Writ of Habeas Corpus; the Petitioner, Ralph R. Earnest, was represented by and through his Trial Attorney, Gary C. Mitchell, and Appellate Counsel, J. Thomas Sullivan; the State of New Mexico was represented by Fifth Judicial District Attorney, Thomas A. Rutledge; the Court reviewed the Petition for Writ of Habeas Corpus, reviewed the briefs of both counsel, the Court listened to argument of counsel, and the Court rendered a decision in writing which was filed for record on January 11, 2005, in which the Court set forth findings of fact and conclusions of law.

IT IS THEREFORE THE ORDER OF THE COURT AS FOLLOWS:

1. The written decision of the Court filed January 11, 2005 is by reference thereto incorporated herein, and in particular the findings of fact and

conclusions of law given by the Court and the decision of the Court are by reference made a part hereof;

2. The conviction of Ralph Rodney Earnest is reversed and set aside;

3. The court having decided that the Writ should be granted, it is therefore ordered the writ issue forthwith.

4. It is the further order of the Court the Writ shall be directed to the Secretary of the New Mexico Department of Corrections, State of New Mexico; and said Secretary of the New Mexico Department of Corrections shall be commanded to have the body of Ralph R. Earnest by him imprisoned and detained, brought before the Honorable Jay W. Forbes, District Judge, Fifth Judicial District Court, State of New Mexico, at his courtroom, County of Eddy, City of Carlsbad at the Eddy County Courthouse, at 8:15 o'clock a.m. on the 8 day of March, 2005, and present him to said District Judge for release from prison. At that time, Ralph Rodney Earnest shall be released from the Secretary's custody and control and delivered to the Court. On that date and at that time, the Court will release Ralph Rodney Earnest from custody unless the State of New Mexico elects to re-file and retry the Defendant, and if so, reasonable conditions of release and bond will be ordered.

/s/ Jay W. Forbes
HONORABLE JAY W. FORBES

SUBMITTED BY:

/s/ Gary C. Mitchell
GARY C. MITCHELL
P.O. Box 2460
Ruidoso, NM 88355
(505) 257-3070

J. THOMAS SULLIVAN
P.O. Box 17007
Little Rock, Arkansas 72222
(501) 324-9940
ATTORNEYS FOR DEFENDANT

Certificate Of Service

I hereby certify that a true and correct copy of the foregoing document was faxed to counsel of record, this 26th day of January, 2005

/s/ Gary C. Mitchell, P.C.
Gary C. Mitchell, P.C.

STATE OF NEW MEXICO
COUNTY OF EDDY
FIFTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs.

RALPH RODNEY EARNEST,

Defendant.

Cause No. CR-82-54JWF
Division_____

WRIT OF HABEAS CORPUS

THE STATE OF NEW MEXICO, County of Eddy, Fifth Judicial District Court, Honorable Jay W. Forbes, District Judge, to the Secretary of the Department of Corrections, States [sic] of New Mexico:

You are hereby commanded to have the body and person of Ralph Rodney Earnest, by you imprisoned and detained, brought to the courtroom of the Honorable J. W. Forbes, District Judge, Fifth Judicial District, which is located in the Eddy County Courthouse, Carlsbad, New Mexico, at 8:15 o'clock a.m. on the 8 day of March, 2005. You will at that time and place release Ralph Rodney Earnest.

/s/ Jay W. Forbes
HONORABLE JAY W.
FORBES.

SUBMITTED BY:

/s/ Gary C. Mitchell
GARY C. MITCHELL
P.O. Box 2460
Ruidoso, NM 88355
(505) 257-3070

J. THOMAS SULLIVAN
P.O. Box 17007
Little Rock, Arkansas 72222
(501) 324-9940
ATTORNEYS FOR
DEFENDANT

Certificate Of Service

I hereby certify that a true and correct copy of the foregoing document was faxed to counsel of record, this 26th day of January, 2005

/s/ Gary C. Mitchell, P.C.
Gary C. Mitchell, P.C.

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

AUGUST 26, 2005

NO. 29,111

STATE OF NEW MEXICO,

Petitioner,

vs.

HON. JAY W. FORBES, District Judge,

Respondent,

and

RALPH RODNEY EARNEST,

Real Party in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing and response thereto, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

IT IS SO ORDERED.

WITNESS, Honorable Richard C. Bosson, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 26th day of August, 2005

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson,
Chief Clerk of the Supreme
Court of the State of New Mexico

ATTEST: A TRUE COPY.

/s/ [Illegible]
Clerk of the Supreme Court
of the State of New Mexico